

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GORDON HEMPTON,

Plaintiff,

v.

POND5, INC., A DELAWARE
CORPORATION; AND POND5 USER
CKENNEDY342, A CORPORATION OR
INDIVIDUAL OF TYPE UNKNOWN,

Defendants.

No.: 3:15-cv-05696-RBL

**SECOND DECLARATION OF
THOMAS CRARY IN SUPPORT OF
POND5, INC.'S MOTION FOR
SUMMARY JUDGMENT**

I, Thomas Crary, declare and state as follows: I am over the age of 18 and am competent to testify to the matters set forth herein. I am the Chief Financial Officer of Pond5, Inc. ("Pond5"). I submit this Second Declaration in Support of Pond5's Motion for Summary Judgment.

1. Currently, Pond5 conducts a curatorial review on the artist level and the clip level. The artist level review was started in 2015 largely due to this litigation. Artist level review for sound effect submissions includes a requirement whereby new contributors are required to submit photographic identification to Pond5 so that we can verify their identity. Additionally, it includes a review of "web presence," whereby Pond5 searches for the contributor and verifies that he or she maintains a presence via a website or on social media whereby the artist presents himself or herself as an artist. Additionally, we conduct a search of the IP address where they last

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IN SUPPORT OF DEFENDANT POND5 INC.'S
MOTION FOR SUMMARY JUDGMENT - 1
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LAW OFFICES OF
NICOLL BLACK & FEIG PLLC
1325 FOURTH AVENUE
SUITE 1650
SEATTLE, WASHINGTON 98101
(206) 838-7555

1 logged in from and check it against our database of other users in an effort to determine whether
2 they might be operating under an alias. These are all processes intended to prevent infringement.
3 They are all manual processes in that they are not (and could not easily be) automated. For
4 example, a curator must visibly check the identification of a contributor to verify that it appears
5 authentic and matches the name entered into our database.

6 2. True and correct copies of relevant excerpts from my deposition, in which I served
7 as the corporate representative of Pond5, are attached hereto as Exhibit 1.

8 3. I have reviewed the email that is attached as Exhibit 14 to the Declaration of
9 Roger M. Townsend in Support of Plaintiff's Opposition to Defendant's Motion for Summary
10 Judgment. That is an email that I sent to Gordon Hempton on October 16, 2015. It was sent after
11 this litigation was commenced for the purpose of reaching a settlement of this matter. I
12 understand that Mr. Townsend argued that the letter "readily connects" ckennedy342's
13 downloads to Mr. Hempton's work. That assertion is untrue. At the time (and even today) I was
14 not able to determine with any degree of accuracy which clips uploaded by ckennedy342
15 infringed upon Mr. Hempton's work. Mr. Hempton never identified those clips, despite my
16 repeated requests for him to do so. In the email, for the purpose of reaching a settlement and
17 compensating Mr. Hempton, I merely made a broad, generalized assumption that any clip
18 uploaded by ckennedy342 that contained a title that I thought could involve a nature sound was
19 owned by Mr. Hempton. I made this assumption for purposes of establishing a rational basis
20 upon which to evaluate possible sales of infringing work and purposefully did so in a way that, in
21 my view, would greatly error on the side of over-compensating Mr. Hempton. This assumption
22 was made solely for purposes of reaching a settlement of the litigation; I certainly don't believe
23 that every clip exhibiting a nature sound that was uploaded by ckennedy342 should be or is
24 owned by Mr. Hempton, nor do I believe that simply attributing clips to Mr. Hempton based
25 solely upon their titles is particularly accurate.

26 4. As I testified to in my deposition, I do not believe that there is a correlation

1 between piracy and the number of clips uploaded by a contributor. In fact, a user who uploads
2 thousands of files over a course of several months without being reported as a likely fraudster is,
3 in my experience, most likely to be a legitimate contributor.

4 5. Prior to receipt of the letter from Mr. Hempton's attorney that was dated June 24,
5 2015, Pond5 did not know that ckennedy342 likely resided in Pakistan. Pond5 could not have
6 discovered that information without conducting an investigation into ckennedy342. In fact, we
7 ultimately made this connection because he had entered pond5.com from an IP address that is
8 geographically affiliated with Pakistan.


9 6. Pond5 has never endeavored to compare contributor names against names that are
10 entered into payment services such as PayPal. Such an endeavor would require Pond5 personnel
11 to manually enter and compare the names that are listed in the payment account. It could not be
12 easily automated because we utilize different payment accounts and they are not connected to our
13 user database. Furthermore such manual access to the PayPal system is only available to certain
14 members of the finance team who require access and is not available to our curators in order to
15 ensure the privacy of our users. Pond5 has considered performing such a search as part of our
16 verification process, but we concluded that it would be ineffective, unreliable, and inefficient.

17 7. Pond5's Content License Agreement requires customers to use reasonable best
18 efforts to provide credit attribution to the Contributor and Pond5. The primary purpose of credit
19 attribution is to protect the rights of the copyright owner of the work and the rights of Pond5 as a
20 licensor of the work.

21 8. Pond5 could not, based upon the notice letter sent by Mr. Hempton's attorney
22 dated June 24, 2015, determine what clips posted by ckennedy342 were infringing. The letter did
23 not identify the clips by name or provide any other sort of identifying information that would
24 allow us to determine which clips were allegedly infringing. The letter also did not enclose a
25 copy of Mr. Hempton's works, a link to where we could locate those works, or any other method
26 in which we could determine what his work was. There was simply no way, based upon the June

1 24 letter, for Pond5 to determine which clips were infringing or which works were infringed
2 upon.

3 I declare under penalty of perjury under the laws of the United States that the foregoing is
4 true and correct, and that this Declaration was executed on May 20, 2016, at New York, New
5 York.

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Thomas Crary

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SECOND DECLARATION OF THOMAS CRARY
IN SUPPORT OF DEFENDANT POND5 INC.'S
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1325 FOURTH AVENUE
SUITE 1650
SEATTLE, WASHINGTON 98101
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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing with the Clerk of the Court using the CM/CF system which will send notification of such filing to the following:

Cynthia J. Heidelberg
BRESKIN JOHNSON & TOWNSEND PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
206-652-8660
Email: cheidelberg@bjtlegal.com

Nicholas E. D. Power
LAW OFFICE OF NICHOLAS POWER
540 Guard St., Ste 140
Friday Harbor, WA 98250
360-298-0464
Email: nickedpower@gmail.com

Roger M. Townsend
BRESKIN JOHNSON & TOWNSEND PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
206-652-8660
Fax: 206-652-8290
Email: rtownsend@bjtlegal.com

DATED this 20th day of May, 2016.

/s/ Larry E. Altenbrun
Larry E. Altenbrun, WSBA #31475

SECOND DECLARATION OF THOMAS CRARY
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